IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2553 of 2005

1. Lalchand Dhanraj Kothari and anr Petitioners.
Vs
1. The Asstt.Collector of Customs
Marine and Preventive Wing and anr Respondents.

Mr H.A.Solkar, for the petitioners.
Mrs M.M.Deshmukh, APP for the respondents.

CORAM : D.B.BHOSALE, J.

DATED : 17.07.2006

P.C.:

1. Heard the learned counsel for the petitioners and the learned APP for the respondents.

2. This petition is directed against the order passed by the Chief Metropolitan Magistrate, Esplanade, Mumbai on the application filed by accused nos 1 and 2 under section 245(2) of the Code of Criminal Procedure (for short, "the Code") as also the order of the Sessions Court dated 6.2.2003, by which it has affirmed the order of the learned Magistrate dated 18.12.2001. By the impugned orders the application under section 245(2) of the Code came to be rejected. It appears that the application was filed solely on the basis of the order of the Customs Excise and Gold (Control) Appellate Tribunal dated 1.2.2001 rendered in the appeal. The learned Magistrate, after appreciating and considering the

material on record in paragraph 12 of its order made the following observations:-

> "In my opinion at this stage it is difficult to make exact assessment of the nature of the statements of the accused because there is no evidence on record to suggest that statements of the accused were procured under coercion, threat or inducement. The prosecution must get an opportunity to place all facts before the criminal court and after examining those facts on the touch stone of the cross-examination either before charge or after the charge then only the independent assessment could be made. The findings in respect of assessment of the statements made by the Tribunal cannot be straight way incorporated by the criminal court for the reason that rules of admissibility of statements in adjudication proceeding and criminal trial are quite different. Definitely, if the accused can succeed in the cross-examination of the witnesses before charge that their statements were in voluntary, but they were forced out of coercion or beating then certainly, that part of the evidence could be exonerated. Further the burden shall be always on the accused to substantiate the fact of using force etc. In addition the matter does not end here because even if these statements are retracted, still if there is other material evidence which could link the accused with the commission of the crime still consequential conviction that may be brought by the prosecution against the accused before the charge. From the tenor of the order of the Tribunal specially its observations in paragraph no.15 it is seen the accused have been given a benefit of doubt because the department was unable to establish the link of source of acquisition with clear and identical evidence for the reasons recorded by the Tribunal which have been already discussed by means above. In such a situation atleast to my mind this is not a case where on the facts assessed by the Tribunal accused could be discharged under Section 245(2) of the Cr.P.C Basically there are two different stages of discharge - the

> first is defined in Section 245(1) of the Cr P C where the Magistrate has to take all the evidence referred to in Section 214 and after recording the same, if the Magistrate finds that no case against the accused is made out which is unrebutted would warrant his conviction, the magistrate has to discharge the accused.In the facts of the present case without giving an opportunity to the prosecution it could not be said that this stage is over, because certain documents like assay report etc which were not produced by the department in the adjudication proceeding are likely to be produced before the criminal court which may alter the picture of the inference drawn by the Tribunal because there is likely hood that the Court may arrive at some different finding that even arrived by the Tribunal."

The learned Magistrate thereafter proceeded to observe in paragraph 15 that it is open for the accused to file discharge application under section 245(1) of the Code after prosecution leads its evidence before charge. In short, the learned Magistrate held that the application under section 245(2) of the Code based on the order of the Customs Excise and Gold (Control) Appellate Tribunal, was premature and left it open to the accused to file such application seeking discharge after recording of the evidence before charge. The order came to be confirmed by the Sessions Court vide order dated 6.2.2003. Mr Solkar, learned counsel for the petitioner, vehemently submitted that despite these orders the department has not adduced the evidence before charge so far and, therefore, the petitioner is forced to approach this court

challenging the orders dated 18.12.2001 and 6.2.2003 passed by the learned Magistrate and Sessions Judge respectively. Considering the overall facts and circumstances of the case and the observations made by the learned Chief Metropolitan Magistrate in paragraphs 12 and 15 of its order dated 18.12.2001, I am satisfied that the following order shall meet the ends of justice.

(i) This petition is disposed of as premature.

(ii) The complainant to lead its evidence before charge as expeditiously as possible and preferably within a period of six months from the date of receipt of this order. It is open for the accused to file application under section 245(1) of the Code of Criminal Procedure seeking discharge at appropriate stage.

(D.B.BHOSALE,J.)